

IN THE
Supreme Court of the United States

Supreme Court, U. S.
FILED

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October Term, 1977

No. **77-1542**

AMOS I. MAGGY,

Petitioner,

vs.

**UNITED STATES OF AMERICA, LEO P. MURPHY, ROBERT
T. GARRISON III, DAVID E. MEEKS, JAMES WEBSTER
and JOE DiGORGIO,**

Respondents.

PETITION FOR WRIT OF CERTIORARI.

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Citations to Opinions Below.

The judgment of the court of appeals is reported at 560 F.2d 1372 (9th Cir. 1977) and is set forth in Appendix "A" to this petition (Appendix pp. 1-8).

The order of the court of appeals denying petitioner's petition for rehearing is set forth in Appendix "B" to this petition (Appendix p. 9). It has not been reported.

The judgment of the United States District Court for the Northern District of California is unofficially reported at 75-2 U.S.T.C. ¶9564 (N.D.Cal. 1975) and is set forth in Appendix "C" to this petition (Appendix pp. 25-26).

Jurisdiction.

The judgment of the court of appeals was entered on September 15, 1977 (Appendix "A", p. 8). The order of the court of appeals denying petitioner's petition for rehearing was entered on January 27, 1978 (Appendix "B", p. 9). The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

Question Presented.

Whether petitioner can be said to have willfully failed to collect, truthfully account for, or pay over any tax withheld from another person, when petitioner was totally ignorant of the legal duty to hold such tax as a special trust fund or deposit such withheld tax prior to the date for remittance; and when the withholding corporation, of which he was a responsible officer, possessed sufficient funds to pay over such tax on the date when petitioner's status as responsible officer was terminated.

Statutes Involved.

Under 26 U.S.C. §§6671-72, penalties may be assessed by the Internal Revenue Service against any person, including any officer or employee of a corporation, who willfully fails to collect or pay over any tax which such person is required to collect or pay over.

26 U.S.C. §7501(a) provides that any taxes collected or withheld by one person from another person shall be held to be a special fund in trust for the United States.

All of the above provisions are printed in Appendix "D" hereto (Appendix, pp. 27-28).

Statement of the Case.

A. Nature of Case and Disposition in Court Below.

Petitioner, Amos I. Maggy ("Maggy"), commenced an action in the United States District Court for the Northern District of California (where jurisdiction was based on 28 U.S.C. §1346; 26 U.S.C. §7422) for refund of \$24.32 paid by Maggy in partial satisfaction of a tax penalty assessed against him in the sum of \$32,060.49 pursuant to Sections 6671 and 6672 of the Internal Revenue Code of 1954 (26 U.S.C. §§6671-72). The assessment was made against Maggy for his alleged failure as a "responsible officer" of Edmap Industries, Inc. ("Edmap") to pay over income and F.I.C.A. taxes withheld from the employees of Edmap for the second quarter (April, May and June) of 1967. Respondent, United States of America ("United States"), filed a counterclaim against Maggy seeking a judgment in the sum of \$32,036.17, representing the unpaid balance of this assessment. Maggy filed a claim for indemnity against the third-party defendants for any liability found against him for the unpaid balance of this assessment. The case was tried to the court sitting without a jury on January 27, 1975, upon which judgment was entered against Maggy and in favor of the United States and the third-party defendants on March 7, 1975. The United States Court of Appeals for the Ninth Circuit affirmed in part and reversed in part the judgment of the District Court, restricting Maggy's liability to the period prior to June 23, 1967, and the period following August 1, 1967, and ending when the corporation went out of business in December, 1967. Maggy's petition for rehearing was denied by the same court in an order filed January 27, 1978.

B. Statement of Facts.

During the second quarter of 1967, Edmap was the primary operating entity in a group of related business entities. As of May 26, 1967, the authorized signatories on the corporate bank account were Maggy, Leo P. Murphy ("Murphy"), Willis S. Johnson, Robert T. Garrison ("Garrison") and Marion Bass. As of April 6, 1967, the officers of the corporation were Maggy, President, David E. Meeks ("Meeks") and Murphy, Vice Presidents and Garrison, Secretary-Treasurer. In addition each of these officers was a director of the corporation. Until approximately June 22, 1967, Maggy was the president of the corporation.

On or about June 21, 1967, the corporate officers and employees became dissatisfied with Maggy's management of the corporation. They retained their own attorney, Mr. Donner, in an effort to oust Maggy from control of the corporation. On June 21, these officers and employees, including the third-party defendants in this action and their attorney, held a meeting with Maggy and the corporation's attorney at the Palace Hotel in San Francisco. As a result of this meeting sweeping changes in the corporate structure took place. The officers and employees threatened to resign *en masse* unless Maggy yielded control of the corporation. Maggy then executed a voting trust agreement under the terms of which all shares held by him (as well as shares held by other shareholders) were transferred to voting trustees. The voting trustees were members of the insurgent group, including all third-party defendants, plus Maggy and the corporation's attorney, Mr. Levine. The voting trust agreement also provided that the voting of shares assigned to the voting trust was by simple majority vote of the voting trustees. The

voting trust provided that Maggy was to remain as a director. As originally drafted, it also provided that the holders of shares transferred to the trust could direct the trustees in voting for directors. This latter provision was struck from the agreement as signed.

On June 23, 1967, Murphy replaced Maggy as president of the corporation, although Maggy remained as Chairman of the board. The board of directors was then organized into a number of committees. The committee charged with the financial affairs of the corporation was the finance committee and consisted of Murphy, Meeks, Garrison, DiGorgio and Webster, the third-party defendants herein. Also, by action of the board of directors on July 13, 1967, Maggy was removed as an authorized signatory on the corporate checking account. Signatories as of that date were Murphy, Meeks, Garrison, Marion Bass and Dorothy L. Rold.

On June 22, 1967, the corporation had approximately \$28,000 in its various bank accounts. On the following day an additional \$30,000 was deposited in these accounts. Thereafter Maggy took a pleasure trip to Mexico. The corporation expected to pay over the withheld tax with the tax return on the due date of the return. (July 31, 1967) This procedure had been acquiesced in by the Internal Revenue Service in past quarters.

After Maggy's resignation as president and while the finance committee controlled the corporation's finances, that committee and its members were advised that the employment taxes were unpaid. The third-party defendants continued to pay other creditors of the corporation, knowing that these employment taxes were unpaid. The third-party defendants continued in control of the corporation beyond the due date of the corporation's employment tax return.

Thereafter, in August, 1967, Maggy returned to the corporation which was virtually without cash. Its only asset was a receivable which Maggy exchanged for a franchise in an effort to resuscitate the corporation. His efforts failed and the corporation went out of business.

REASONS FOR GRANTING THE WRIT.

The commonly quoted interpretation for the willfulness requirement contained in Section 6672 of the Internal Revenue Code of 1954 (26 U.S.C. §6672) is set forth in the 1959 case of *Bloom v. United States*, 272 F.2d 215 (9th Cir. 1959). The court in *Bloom* stated that conduct was willful when it consisted of "a voluntary, conscious, and intentional act to prefer other creditors of the corporation over the United States."

However, inconsistency among the circuits of the United States Court of Appeals has arisen in the form of a viewpoint, held by the Fifth Circuit, that such conduct must also be without reasonable cause or justifiable excuse in order to meet the willfulness requirement. See *Newsome v. United States*, 431 F.2d 742 (5th Cir. 1970); *Cash v. Campbell*, 346 F.2d 670 (5th Cir. 1965). In addition, other circuits have found the conduct of certain taxpayers to have been merely negligent, rather than willful. See *Dudley v. United States*, 428 F.2d 1196 (9th Cir. 1970); *Moody v. United States*, 275 F.Supp. 917 (E.D. Mich. 1967); *Wiggins v. United States*, 188 F.Supp. 374 (E.D. Tenn. 1960).

In *Dudley*, the Ninth Circuit held that payment to the United States by means of a dishonored check did not relieve the taxpayer of liability; however, the taxpayer's ignorance of the insufficient funds available to support the check vitiated any willfulness on his part, so judgment against him was reversed. The factual situation in *Moody* was very similar, with the same result. The court in *Wiggins* stated that

"[t]he proof would have to disclose that [use of funds to pay other bills in preference over

the United States] was done on purpose, *knowing that the taxes were due* but paying other bills ahead of them." (Emphasis added).

In the present case, the petitioner has not disputed that he was a "responsible officer" of Edmap, within the meaning of Sections 6671 and 6672 of the Internal Revenue Code of 1954, during the period April 6, 1967 through June 22, 1967. However, Robert T. Garrison, Edmap's chief financial officer and former controller who managed payroll systems for other corporations, never informed him of the requirement for depositing withheld funds (Reg. §31.6302) or of the status of withheld funds as a special fund held in trust for the United States (26 U.S.C. §7501(a)). In addition, the Internal Revenue Service never challenged the corporation's failure to deposit. Petitioner was totally ignorant of these requirements and of the provisions causing withheld funds to be due when withheld. As a result, his acquiescence in the depletion of corporate funds during the second quarter of 1967 was not a "willful preference of other creditors," but mere negligence in failing to be aware of the legal status of the withheld funds.

The United States District Court for the Northern District of California made a specific finding that petitioner was unaware of his duty to make deposits. Yet the court of appeals subsequently held petitioner responsible for those amounts withheld through June 22, 1967. Why is ignorance of the insufficiency of funds mere negligence, while ignorance of the due date equivalent to willfulness? In *Belcher v. United States*, 6 AFTR 2d 5495 (D.Va. 1960), the taxpayer's reliance on the information provided by his bookkeeper

abrogated his willfulness. Why did not petitioner's reliance on the information provided by his chief financial officer abrogate his willfulness?

It should be noted, in addition, that while petitioner did concededly allow the corporate funds to be depleted below the level of withheld income and F.I.C.A. taxes during the second quarter, such funds were totally replenished by the day following his ouster from office. Consequently, the depletion of funds and payments in preference to other creditors which actually resulted in nonpayment of the taxes on the date for remittance was a totally separate depletion. Further, at the time of such depletion the taxpayer, as in *Dudley (supra)*, was no longer a responsible officer and without any control over the disbursement of corporate funds (*see* court of appeals opinion, page 5).

The gross inconsistencies and continuing confusion among the circuits, resulting in inequitable holdings such as presented hereinabove, warrants resolution by this Court.

Conclusion.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

DAVID WARREN,

Attorney for Petitioner.

APPENDIX "A".

Opinion.

United States Court of Appeals for the Ninth Circuit.

Amos I. Maggy, Plaintiff-Appellant, v. United States of America, et al., Defendant-Appellee. No. 75-2401.

Appeal from the United States District Court for the Northern District of California.

Before: CHAMBERS and CHOY, Circuit Judges, and BONSAI,* District Judge.

CHAMBERS, Circuit Judge:

Appellant Maggy filed suit against the United States for refund of \$24.32 which he had paid in partial satisfaction of a \$32,060.49 tax penalty assessed against him pursuant to 26 U.S.C. §§ 6671-72. He additionally prayed for indemnification from third party defendants for any further liability on the balance of the assessments. After a trial to the court, judgment in the amount of \$32,036.17 was entered in favor of the United States on its counterclaim against Maggy for the unpaid balance of the assessment. Maggy's indemnification claim was also denied.

Under 26 U.S.C. §§ 3101-02, employers are required to regularly withhold Social Security and FICA taxes from their employees' wages. These taxes are collected from the employers quarterly. The quarter involved in this suit extended from May through July, 1967. The money collected by employers for these taxes is required to be held in trust by them until the end of the quarter pursuant to 26 U.S.C. § 7501(a). Since the government has no recourse against the individual

*The Honorable Dudley B. Bonsal, United States District Judge, Southern District of New York, sitting by designation.

employees if these taxes are not paid at the end of each quarter, 26 U.S.C. § 6672 imposes a 100 percent penalty tax for the willful failure "to collect, truthfully account for, and pay over" these taxes by the "person required" to do so. Maggy's liability arose from the following facts.

On April 6, 1967, Maggy was elected president, director, and chairman of the board of Edmap Industries, Inc. (Edmap), of which he and his wife owned 40 percent of the outstanding shares. Maggy retained the position of president until June 22, 1967. During that time, Edmap was in constant financial difficulty, as it had been since its inception. The Edmap bank account for the period showed an average daily balance of \$18.00, and a minimum balance reflecting an overdraft. Maggy was advised at least weekly of Edmap's financial condition, and was told at least twice that this account, which contained the taxes withheld from the employees, was overdrawn.

On June 22, 1967, under threat of a total strike by all Edmap executives and employees, Maggy agreed to a meeting to discuss internal reorganization. This meeting resulted in Maggy's signing a voting trust agreement under which his shares of Edmap were to be voted by nine trustees. While no shares of stock were ever transferred to this trust, and Maggy claimed to doubt its legal validity, the agreement by its terms acted as a transfer of the stock pending its delivery. Maggy resigned as president of Edmap but remained chairman of the board. The June 22 meeting also resulted in the creation of a financial committee which, though technically under the authority of the board of directors, as a practical matter did not report to it. This committee made the daily decisions as to

which of Edmap's creditors were to be paid. Maggy remained an authorized signator on the Edmap bank accounts, and his signature alone was sufficient to withdraw funds until July 18, 1967. Maggy, however, allegedly thought his name was removed as an authorized signator on June 22, 1967, the date of the organizational shake-up. Maggy retained his offices and continued to work for Edmap during the period following June 22.

On the date Maggy resigned as president, there were adequate funds in the Edmap account to pay the withholding taxes which had accrued to that date. On July 7, all members of the board of directors were informed of the amount of taxes owned and of the additional debts owed to other Edmap creditors. When Maggy returned from a two-week vacation in July, he was informed that withheld taxes in the amount of \$32,060.49 were due on July 31. Maggy took no action on this information, and did not bring it to the attention of the board of directors.

On August 2, 1967, Maggy was reelected president of Edmap. As of July 31, the Edmap account contained \$6,417.12, and deposits totalling \$3,567.18 were made on August 1 and 4. After his reelection, Maggy made no attempt to pay any of these funds to the United States. He ultimately was assessed for the full amount of the taxes.

For liability to arise under 26 U.S.C. § 6672, our court has held that the party assessed with the penalty must meet two requirements. He must be a "responsible person": one who is required "to collect, truthfully account for, and pay over" the tax. And he must willfully refuse to pay it. *Teel v. United States*, 529 F.2d 903, 905 (9th Cir. 1976). The district court

found that at all times relevant to the case, Maggy was aware that taxes were being withheld from the employees' wages; was aware that these amounts were due to the United States; was a responsible person within the ambit of section 6672 with the power to pay these taxes; and had made no attempt to pay the taxes due on July 31 for the preceding quarter. In addition, the court found that from April to December, 1967, when Edmap ceased doing business, Maggy was aware that creditors of Edmap were paid in preference to the United States, and that he was an active participant in the failure to pay the withheld taxes to the United States. Maggy essentially argues on appeal that his position at Edmap was totally meaningless after June 22, and that since there were sufficient funds in the Edmap account on that date to pay the taxes when accrued, he should not be held liable for the fact that the account was deficient on July 31.

A "responsible person" subject to the reach of 26 U.S.C. § 6672 is one who has the final word on which bill should or should not be paid. *Bloom v. United States*, 272 F.2d 215 (9th Cir. 1959), *cert. denied*, 363 U.S. 803 (1960). The district court found Maggy to be a responsible person for the entire quarter because he remained chairman of the board of directors and a signator on Edmap's accounts until July 18. Under California law and Edmap's by-laws, the board of directors had ultimate control over all aspects of the corporation and its personnel. Additionally, the district court found that it was contrary to California law for the board of directors to totally abdicate all financial responsibility for a corporation to a finance committee, as Maggy alleges occurred here.

In *United States v. Graham*, 309 F.2d 210 (9th Cir. 1962), we held that one who was solely a member of the board of directors, and was not an executive officer, employee or signator of the corporate bank accounts, could be a responsible person under the statute. The term "responsible person" was held to encompass "all those so connected with a corporation as to be responsible for the performance of the act" relating to the violation. *Id.* at 212. On our facts, however, we feel that Maggy can only be said to have been a responsible person until June 22, 1967. While he remained chairman of the board of directors and an unknowing signator on the Edmap account until July 18, the evidence indicates that after the June 22 meeting, Maggy was stripped of all significant authority over Edmap. The board of directors indeed may have retained legal responsibility for the acts of the finance committee, but the fact remains that Maggy was kept isolated from the committee's activities and decisions.

Our review of the district court's finding of fact with respect to Maggy's status as a responsible person for purposes of 26 U.S.C. § 6672 is subject to the standards of Federal Rule of Civil Procedure 52(a), and thus it cannot be set aside unless it is "clearly erroneous." See *Bloom, supra* at 223. From the record before us, we cannot conclude that Maggy had the final word on what corporate bills were to be paid after June 22. We are left with the definite and firm conviction that the district court committed a mistake in finding that Maggy was a responsible person for the entire relevant quarter. See, e.g., *United States v. United States Gypsum Co.*, 333 U.S. 364, 394-95 (1948); *Anderson v. United States*, 555 F.2d 236, 237 (9th Cir. 1977). In light of this error, Maggy's

liability for the withheld quarterly taxes in issue can only extend from May 1 to June 22.

Moreover, Maggy can only be held liable for the taxes collected during this period if his failure to pay them over was willful. Maggy contends that willfulness is lacking here because there were adequate funds in the Edmap account on June 22 to cover the taxes withheld up to that date. The willfulness requirement is met when a responsible officer voluntarily, consciously, and intentionally causes his corporation to pay creditors out of withheld funds while he is aware that such funds are owed to the United States. *Bloom v. United States, supra*; see *Hartman v. United States*, 538 F.2d 1336 (8th Cir. 1976). Willfulness can be proven by the preference of other creditors over the United States either before or after the actual due date for remittance of the taxes.

In *Newsome v. United States*, 431 F.2d 742 (5th Cir. 1970), it was held that a responsible person's actions prior to the due date may evidence willfulness when that person knows that the withheld funds are being used for other corporate purposes, even if he or she thoroughly expects sufficient funds to be available for payment when the due date actually arrives. Since the average daily balance in the Edmap account between April 1 and June 22 was \$18.00, and the account had been overdrawn at least twice, Maggy clearly was aware that during the period for which he was "responsible" corporate funds were at times lower than the amount of taxes withheld. By allowing this condition to exist during the pre-June 22 period, Maggy risked subjecting himself to liability if, as in fact happened, insufficient funds were available on

July 31 to cover the taxes collected for the preceding quarter.

In addition, when Maggy resumed control of Edmap in August, he made no efforts to pay the taxes due to the United States with the funds then available in the Edmap account or which were received during the following week. In *Teel v. United States, supra*, we held that willfulness was present when responsible persons of a corporation which had gone into receivership used funds from the sales of inventory to purchase new merchandise, knowing that taxes were owing to the United States. Despite the receivership status, the funds which came into the corporation became immediately subject to a trust or lien in favor of the United States for the unpaid withholding taxes, and the appellants were liable for all past withholding taxes collected while they were responsible persons of the corporation. Maggy's actions when he resumed control of Edmap thus reinforce our finding of willfulness.

The case of *Dudley v. United States*, 428 F.2d 1196 (9th Cir. 1970), which Maggy argues disavows *Newsome, supra*, in this circuit, is inapposite. The cases are not incompatible, and the mitigating factors present in *Dudley*—the sending of the check for the Internal Revenue Service, the government's delay in depositing the check, and the subsequent payment of other corporate creditors without knowledge that the check to the United States had been dishonored—are not present here.

For these reasons, we find that Maggy is liable for the amount of taxes required to be withheld from May 1 to June 22, 1967. Maggy's statement that he was a passive participant in the failure to pay

the taxes, and as such is entitled to indemnification from the third-party defendants in this suit, is unpersuasive. Substantial evidence supports the district court's conclusion that Maggy was an active participant in the failure to pay over the taxes, and we see no clear error in this finding. *See Bloom, supra*. Therefore, the indemnification claim was properly rejected. In accordance with the above, the judgment is affirmed in part and reversed in part.

APPENDIX "B".

Order Denying Petition for Rehearing.

Filed: January 27, 1978.

United States Court of Appeals for the Ninth Circuit.

Amos I. Maggy, Plaintiff-Appellant, vs. United States of America, et al., Defendant-Appellee. No. 75-2401.

Before: CHAMBERS and CHOY, Circuit Judges, and BONSAL, District Judge.

The petition for rehearing is denied.

APPENDIX "C".

Findings of Fact and Conclusions of Law.

United States District Court, Northern District of California.

Amos I. Maggy, Plaintiff and Third-Party Plaintiff, vs. United States of America, Defendant. Leo P. Murphy, Robert T. Garrison III, David E. Meeks, James Webster, Joe DiGorgio, also known as Joseph DiGorgio, and Doe 1 through Doe 10, Third-Party Defendants. No. C-71-0875 WHO.

Filed: February 20, 1975.

Plaintiff, Amos I. Maggy (Maggy), commenced this action as a suit for a refund of \$24.32 paid by Maggy in partial satisfaction of a tax penalty assessed against him in the sum of \$32,060.49 pursuant to Sections 6671 and 6672 of the Internal Revenue Code of 1954 (26 U.S.C. §§6671 and 6672). The assessment was made against Maggy for his failure as a "responsible officer" of Edmap Industries, Inc. (Edmap) to pay over income and F.I.C.A. taxes withheld from the employees of Edmap for the second quarter (April, May, and June) of 1967.

Defendant, United States of America (United States), filed a counterclaim against Maggy seeking a judgment in the sum of \$32,036.17 representing the unpaid balance of this assessment. Maggy filed a claim for indemnity against the third-party defendants for any liability found against him for the unpaid balance of this assessment.

The case was tried to the Court sitting without a jury on January 27, 1975.

Upon full consideration of all the evidence, oral and written, and all the briefs and arguments of counsel, I find for defendant and counterclaimant, United States. I find against plaintiff and third-party plaintiff, Maggy, on both the initial claim for a tax refund and the third party claim for indemnity. Specifically, I find that, although Edmap underwent three different phases of internal corporate organization during the period in question, at all times relevant to this action Maggy was aware that Edmap was withholding income and F.I.C.A. taxes from the wages of its employees and Maggy was aware of the corporation's responsibility to pay such taxes over to the United States. At all times relevant to this action, Maggy was a "responsible officer" of Edmap with the authority to pay over the withheld taxes. At no time did Maggy make any effort to pay the corporate taxes that were due and owing to the United States for the second quarter of 1967.

I make the following additional Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

A. Corporate Organization Pre-June 22, 1967

1. Edmap, Inc. was incorporated under the laws of California on or about October 18, 1965. On or about April 27, 1967, Edmap, Inc. acquired all the outstanding shares of Software, Inc., a California corporation. On or about April 27, 1967, Software, Inc. was merged into Edmap, Inc., and the name of the corporation changed to Edmap Industries, Inc. (Edmap).

2. The incorporators of Edmap, Inc. were Maggy, Kathy Maggy, Jack Levine and Bob Levine.

3. The principal business of Edmap was the sale of computer software until it ceased doing business in December, 1967. Edmap was also involved in the sale of securities.

4. Under the by-laws of Edmap, all the powers of the corporation were exercised by or under authority of, and the business and other affairs of the corporation, were controlled by, the Board of Directors.

5. Under the by-laws of Edmap, all officers of the corporation, including the president and secretary-treasurer were elected by, served at the pleasure of, and were subject to the control of, the Board of Directors.

6. Under the by-laws of Edmap, the Board of Directors were authorized to appoint committees, consistent with California corporation law.

7. On April 6, 1967, Maggy, Leo Paul Murphy (Murphy), David Meeks (Meeks) and Robert T. Garrison III (Garrison), were elected directors of the corporation. On that date Maggy was elected President of the corporation and Chairman of the Board of Directors, Meeks and Murphy were elected Vice Presidents and Garrison was elected Secretary and Treasurer.

8. Maggy was the Chairman of the Board of Directors of Edmap from April 6, 1967, until the corporation ceased doing business in December, 1967. Maggy was President of Edmap from April 6, 1967, to June 22, 1967, and from August 2, 1967, until the corporation ceased doing business in December, 1967.

9. During the break in Maggy's tenure as President of Edmap, Murphy served as President of the corpora-

tion. Murphy was President of Edmap from June 22, 1967, until his formal resignation from the corporation on August 1, 1967. Meeks formally resigned from Edmap on August 2, 1967. From April 6, 1967, until their respective dates of resignation or until the corporation ceased doing business, the Board of Directors of Edmap consisted of Maggy, Murphy and Meeks.

10. On March 29, 1967, Garrison was elected Executive Vice President of Edmap, and on April 6, 1967, was elected Secretary-Treasurer of Edmap, which position he held until his resignation on August 7, 1967. As both Executive Vice President and Secretary-Treasurer, Garrison was in charge of the accounting and bookkeeping functions of Edmap.

11. At all times relevant to this action, Maggy and his wife, Kathy Maggy, owned not less than 40% of the outstanding share of Edmap.

12. Edmap maintained a checking account with the Lafayette Branch of the Wells Fargo Bank at all times relevant to this action. Maggy was an authorized signator on this account until July 18, 1967, when new signature cards were given to the Wells Fargo Bank. Murphy, Meeks, Garrison, Marion Bass (Bass) and W. S. Johnson (Johnson) were also named as signatories on the corporation's bank account at Wells Fargo Bank. Until July 18, 1967, only one signature was required to draw checks on the Wells Fargo account.

13. Edmap was in constant financial difficulty from its incorporation on October 18, 1965, until it ceased doing business in December, 1967. During this period, Edmap continuously had more bills due than it had available funds to pay such bills.

14. During this period from April 1, 1967, to June 22, 1967, the Wells Fargo Bank account of Edmap was frequently overdrawn. The account's opening balance on May 17, 1967, was a \$4,985.04 overdraft. For the period May 17, 1967, to June 19, 1967, the account had an average balance of \$18 and a minimum balance reflecting an overdraft. The account's opening balance on June 17, 1967, was \$4,-014.60. For the period June 19, 1967, to June 30, 1967, the account had an average balance of \$24,878 and a minimum balance reflecting an overdraft. The opening balance of the account on June 30, 1967, was \$18,853.21.

15. From April 1, 1967, to June 22, 1967, Garrison advised Maggy of the financial condition of Edmap at least once a week. Garrison advised Maggy on at least two occasions—June 12, 1967, and June 13, 1967—that the Wells Fargo Bank account of Edmap was overdrawn.

16. From April 1, 1967, to June 22, 1967, Maggy was in sole control of Edmap and decided which creditors of the corporation would or would not be paid. Maggy has admitted that he was the person responsible for the collecting and paying over of the income and F.I.C.A. taxes of the employees of Edmap from April 1, 1967, to June 22, 1967.

17. From April 1, 1967, to June 22, 1967, Maggy took no steps to maintain a balance in the Wells Fargo Bank account of Edmap sufficient to cover the income and F.I.C.A. taxes withheld by the corporation.

B. Corporate Reorganization of June 22, 1967

18. On or about June 22, 1967, Edmap underwent internal reorganization. Murphy telephoned Maggy on

or about June 22, 1967, and told Maggy that every employee of the corporation, from executives to computer programmers, would walk off the job unless Maggy agreed to meet with a group of officers, employees, and investors. A meeting was therefore arranged at the Palace Hotel in San Francisco. It was attended by Murphy, Meeks, Garrison, their attorney, Mr. Donner, investors, key employees, and Maggy. At this meeting a discussion was held in which Maggy was persuaded to accept a new corporate organization.

19. At the meeting at the Palace Hotel, Maggy was presented with a voting trust agreement under the terms of which Maggy's shares of stock in the corporation would be voted by a majority of the voting trustees therein named. Nine voting trustees were named, including Maggy, Murphy and Meeks. The voting trust agreement, or a second draft thereof, was signed by all parties at or shortly after the meeting at the Palace Hotel. No shares of stock were submitted to the corporation for transfer to the voting trustees. However, the voting trust agreement provided that pending delivery of such stock, the agreement acted as a transfer of stock to the voting trustees. The practical effect of the execution of the voting trust agreement was to terminate Maggy's right to exercise control of the corporation as a shareholder. After the execution of the voting trust agreement, Maggy expressed doubt as to the legal validity of the trust agreement.

20. The other aspect of the corporate reorganization was to remove Maggy as President of the corporation. At the meeting at the Palace Hotel, Maggy agreed to resign as President of the corporation. On or about June 22, 1967, Maggy resigned as President of the corporation. His resignation was accepted by the corpo-

ration's Board of Directors, and Murphy was elected as President of the corporation.

21. The final phase of the corporate reorganization involved the corporation's finances. The Board of Directors of Edmap created a Financial Committee. This Committee consisted of the third-party defendants herein other than Meeks. Maggy was not a member of the Financial Committee. After June 22, 1967, the Financial Committee made the daily decisions as to which of the creditors of Edmap would or would not be paid. The Financial Committee operated under the authority, control and supervision of the Board of Directors of Edmap. As a practical matter, the Financial Committee did not report to the Board of Directors.

22. After the corporate reorganization, Maggy retained his position as Chairman of the Board of Directors. Maggy also retained his position as signator on Edmap's bank account until July 18, 1967. From on or about June 22, 1967, until the first week in August, 1967, Maggy continued to work at the corporation's offices in Walnut Creek, California, except for a two-week period in July of 1967 during which he was on vacation in Mexico.

23. At the time of the corporate reorganization of June 22, 1967, Edmap had \$29,930.95 on hand in the corporate bank accounts. That cash was sufficient to pay substantially all the corporation's employment tax liability. On June 22, 1967, a net addition of \$19,854.04 was made to the corporation's Wells Fargo Bank account. On June 23, 1967, a net addition of \$23,433.96 was made to the same account.

24. At all times relevant to this action, Maggy was aware that Edmap was withholding income and

F.I.C.A. taxes from the wages of its employees and Maggy was aware of the corporation's responsibility to pay such taxes over to the United States. During the second quarter of 1967 (April, May and June), Edmap withheld \$32,060.49 in income and F.I.C.A. taxes from the wages of its employees, no portion of which amount has ever been paid over to the United States. Maggy was not aware that Edmap had an obligation to purchase depository receipts for the taxes withheld for the months of April and May, 1967, and no such depository receipts were purchased.

25. On or about Friday, July 7, 1967, Garrison prepared a memorandum to the Board of Directors of Edmap, composed of Maggy, Murphy and Meeks, which was delivered upon completion to each member of the Board of Directors, including Maggy. Murphy received the memorandum not later than July 18, 1967. The memorandum contained a current Cash and Liability Condition of Edmap as of July 7, 1967, which reflected that \$56,586.12 in federal payroll taxes were due the United States, and that an additional \$85,847.34 in past due bills were then due to other creditors of the corporation.

26. Immediately upon his return in July, 1967, from a vacation in Mexico, Maggy was informed that federal payroll taxes withheld from the wages of the employees of Edmap were owed for the second quarter of 1967.

27. Upon being informed of the liability of Edmap for withheld payroll taxes for the second quarter of 1967, Maggy took no action. Maggy did not bring the matter to the attention of the Board of Directors although he was Chairman of the Board. Maggy did

not attempt to use his authority as a signator on the corporation's Wells Fargo Bank account to insure payment of the withheld taxes to the United States.

*C. Corporate Organization
Post August, 1967*

28. On August 1, 1967, a directors' meeting was held which was attended by Maggy, Meeks and Murphy. Murphy advised the meeting that the corporation had made every effort to reduce its indebtedness, although he did not specifically mention unpaid employment taxes. At the conclusion of the meeting, he resigned as a director and as President. On the following day, a meeting was held between Meeks and Maggy at which time Maggy was elected President of the corporation and thus resumed operating control thereof.

29. On July 31, 1967, the Wells Fargo Bank account of Edmap had a balance of \$6,417.12 and deposits totalling \$3,567.18 were made to the account on August 1, 1967, and August 4, 1967.

30. On August 15, 1967, Maggy sold an account receivable in the amount of \$16,000 due from Douglas Aircraft to Edmap to Concept Development in exchange for a franchise agreement with that concern.

31. After Murphy's resignation on August 1, 1967, and after he was re-elected President of Edmap on August 2, 1967, Maggy took no steps to see to it that the taxes withheld from the wages of the corporation's employees were paid over to the United States.

32. Maggy was aware from April 1, 1967, until Edmap ceased doing business in December, 1967, that the creditors of the corporation were paid in preference to the United States.

33. Maggy was an active participant in the failure to pay over the corporation's withheld tax. Although Maggy customarily did not draw checks on the corporate bank account, he had the power to do so and thereby the power to pay the taxes to the United States. He was not prevented from discharging his duty to pay the taxes by the actions of other people involved in the corporation. Prior to June 22, 1967, Maggy had the power to pay the taxes since he essentially held one-man rule over the corporate affairs of Edmap. From June 22 to July 18, 1967, Maggy remained a signator on the corporate account and could have paid the withheld taxes. On August 2, 1967, when Maggy was reinstated as President of the corporation, he again had the power to sign checks on the corporate account and could have used any funds held by the corporation to pay the withheld taxes.

34. On December 11, 1970, the defendant's Internal Revenue Service assessed against Maggy the sum of \$32,060.49 plus interest pursuant to Sections 6671 and 6672 of the Internal Revenue Code of 1954 (26 U.S.C. §§6671 and 6672) for his failure to pay over the withheld taxes of Edmap for the second quarter of 1967.

35. On or about February 1, 1971, Maggy paid the amount of \$24.32 against said assessment and filed a claim for the refund of said payment.

II. CONCLUSIONS OF LAW

1. This Court has jurisdiction over this action. 26 U.S.C. §1346(a)(1); 26 U.S.C. §7422(a). This Court also has jurisdiction over the counterclaim in this action.

26 U.S.C. §1346(c); Rules 13 and 19, Federal Rules of Civil Procedure.

2. Every employer is required to withhold income and F.I.C.A. taxes from the wages of its employees. 26 U.S.C. §§3101 and 3402.

3. Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. 26 U.S.C. §7501(a).

4. Any person required to withhold and pay over any internal revenue tax, who willfully fails to pay over such tax is liable for the amount of the tax not paid over. 26 U.S.C. §§6671(b) and 6672.

5. A "responsible officer" of a corporation, within the meaning of Sections 6671(b) and 6672, include those officers so connected with the corporation as to have the responsibility and authority to avoid the default which constitutes a violation of Sections 6671(b) and 6672, even though liability may thus be enforced against more than one person. *White v. United States*, 372 F.2d 513 (Ct. Cl., 1967); *Monday v. United States*, 421 F.2d 1210 (7th Cir. 1970), cert. den. 400 U.S. 821 (1970).

6. The test used in determining the identities of the "responsible officers" of a corporation is who has "the final word on which bill should or should not be paid". *Bloom v. United States*, 272 F.2d 215, 222 (9th Cir. 1959), cert. den. 363 U.S. 803 (1960); *United States v. Graham*, 309 F.2d 210 (9th Cir. 1962); *White v. United States*, supra.

7. A "responsible officer's" liability for paying over of withholding taxes arises at the time such taxes are withheld from the employees' wages. *Newsome v. United States*, 431 F.2d 742 (5th Cir. 1970); *Seaton v. United States*, 254 F.Supp. 161 (W.D. Mo. 1966); *Long v. United States*, 239 F.Supp. 911 (S.D. Iowa 1965); *Korman v. U.S.*, 35 Am. Fed. Tax R.2d 75-424 (E.D.N.Y. 1974).

8. Willfulness, within the meaning of Section 6672 of the Internal Revenue Code of 1954, means that a responsible officer voluntarily, consciously, and intentionally causes his corporation to pay creditors out of withheld funds, while he is aware that such funds are still owed to the United States. *Bloom v. United States*, supra; *White v. United States*, supra. Thus, the decision of a responsible officer not to have the corporation pay over to the United States the withheld taxes is a voluntary, conscious and intentional act to prefer other creditors over the United States and constitutes willfulness within the means of Section 6672. *Bloom v. United States*, supra.

9. The willfulness of a responsible officer can be proved by his preference of other creditors either before or after the due date for the corporation to remit withheld taxes. Before payment is due, willfulness is evidenced when the responsible officer knows that the withheld funds are being used for other corporate purposes, regardless of his expectation that sufficient funds will be on hand on the due date for payment of the taxes. *Newsome v. United States*, supra. A responsible officer has a duty to see that withheld funds are maintained during the quarter in question. *Newsome v. United States*, supra.

10. The fact that on June 22, 1967, when Maggy resigned as President of Edmap, the corporate bank accounts had enough money on hand to pay substantially all of the withholding taxes due, does not absolve Maggy from liability for the failure of Edmap to pay its withholding taxes for the second quarter of 1967. Since a responsible officer's liability accrues at the time the taxes are withheld from employee wages, the responsible officer cannot escape liability by resigning one of his corporate positions on a date when corporate assets happen to be high.

11. The decision of *Dudley v. United States*, 428 F.2d 1196 (9th Cir. 1970) does not negate the holding of *Newsome v. United States*, *supra*, that a responsible officer's liability for the paying over of withholding taxes arises at the time such taxes are withheld from the employees' wages. Dudley attempted to pay the taxes that were due, but unbeknown to him the check to the Internal Revenue Service was not honored by the bank. By the time Dudley discovered that the taxes had not been paid, he no longer was in a position of responsibility within the corporation. Dudley was not held liable for the unpaid corporate withholding taxes because he had not *willfully* failed to pay the taxes, not because the liability to pay did not accrue when the taxes were withheld.

12. Maggy concedes that he was a "responsible" officer of Edmap within the meaning of Sections 6671 (b) and 6672 prior to June 22, 1967. However, he was also a "responsible" officer after June 22, 1967. After June 22, 1967, Maggy was Chairman of the Board of Directors and, until July 18, 1967, was a signator on the corporation's bank account.

Under California law, and the by-laws of Edmap, all powers of the corporation were exercised by or under the authority, and the business and affairs of the corporation were controlled by, the Board of Directors. California Corporations Code, Section 800. In addition, all officers and committees of the corporation acted under the ultimate authority and at the pleasure of the Board of Directors. Moreover, it is contrary to California law for the Board of Directors to abandon their financial authority over a corporation to a finance committee. See, *Smith v. California Thorn Cordage*, 129 Cal.App. 93, 98 (1933); 6 Witkin, *Summary of California Law*, 8th Ed., pp. 4383-4384. Finally, upon being re-elected President of the corporation on August 2, 1967, while continuing as Chairman of the Board, Maggy was a responsible officer after August 1, 1967.

13. The factual situation in *Wilson v. United States of America*, 1 U.S.T.C. #9205 (N.D. Ga. 1975) was quite different from that in the case at bar. In *Wilson*, the plaintiff did not have the ultimate authority to sign checks on the company account or to determine which creditors should be paid. In *Wilson*, the plaintiff's sole badge of authority rested on the fact that he was a signator on the account. Accordingly, he was held not to be a "responsible party". In the case at bar, Maggy was not only a signator on the account, he also exercised unfettered power to draw checks if he chose to do so. Moreover, in *Wilson*, the plaintiff did not know that the corporate taxes had not been paid. On the other hand, Maggy did know that Edmap's withholding taxes were due and owing to the federal government; yet, he continued to prefer other creditors over the United States.

14. Maggy is a person within the meaning of Section 6672 who willfully failed to pay over to the United States \$32,060.49 in the income and F.I.C.A. taxes withheld from the wages of employees of Edmap for the second quarter of 1967.

15. Maggy is liable to the United States in the sum of \$32,060.49, less the amount of \$24.32 previously paid by him.

16. Because Maggy was an active participant in the failure to pay the corporate withholding tax, he is not entitled to indemnification from the third-party plaintiffs. *Great Am. Ins. Co. v. Evans*, 269 F.Supp. 151 (N.D. Cal. 1967).

17. Plaintiff and third-party plaintiff, Maggy, is not entitled to recovery on his counterclaim.

18. Defendant, United States, is ORDERED to prepare, serve, and file before March 5, 1975, a judgment in accordance with the foregoing Findings of Fact and Conclusions of Law in form approved by the plaintiff and third-party plaintiff, Maggy.

Dated: February 19, 1975.

/s/ William H. Orrick, Jr.
William H. Orrick, Jr.
United States District Judge

Judgment.

Filed March 5, 1975.

In the United States District Court for the Northern District of California.

Entered in Civil Docket March 7, 1975.

Amos I. Maggy, Plaintiff and Third-Party Plaintiff, v. United States of America, Defendant. Leo P. Murphy, Robert T. Garrison III, David E. Meeks, James Webster, Joe DiGorgio, also known as Joseph DiGorgio, and Doe 1 through Doe 10, Third-Party Defendants. No. C-71-875-WHO.

This action having come on for trial before the Court, the Honorable William H. Orrick, Jr., United States District Judge, presiding, and after full consideration of the stipulated dismissal involving Third-Party Defendant JAMES WEBSTER and of all the evidence, oral and documentary, and of all the arguments and briefs of counsel, and the Court on February 20, 1975, having filed its findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure it is hereby.

ORDERED AND ADJUDGED that the plaintiff and third-party plaintiff AMOS I. MAGGY, take nothing from the defendant UNITED STATES OF AMERICA, and that plaintiff's and third-party plaintiff's complaint and this action be dismissed on the merits; it is further

ORDERED AND ADJUDGED that the plaintiff and third-party plaintiff AMOS I. MAGGY take nothing from the third-party defendants LEO P. MURPHY, ROBERT T. GARRISON III, DAVID E. MEEKS and JAMES WEBSTER, and that plaintiff's and third-

party plaintiff's third-party complaint and this action be dismissed on the merits; it is further

ORDERED AND ADJUDGED that the defendant UNITED STATES OF AMERICA do have and recover from the plaintiff and third-party plaintiff AMOS I. MAGGY due and unpaid internal revenue taxes in the sum of \$32,036.17, together with interest on said sum at the rate of 6 percent per annum from December 11, 1970, the date of the assessment of said taxes; and it is further

ORDERED AND ADJUDGED that the aforementioned defendant and third-party defendants except defendant JAMES WEBSTER do have and recover their costs of action from the plaintiff and third-party plaintiff.

ORDERED AND ADJUDGED this 5th day of March, 1975, at San Francisco, California.

/s/ William H. Orrick, Jr.

UNITED STATES DISTRICT JUDGE

Approved as to form: Johnston, Klein, Horton, Solomon & Baker.

By: /s/ Robert H. Solomon
Robert H. Solomon

APPENDIX "D".

26 U.S.C. §§6671-72.

SEC. 6671. RULES FOR APPLICATION
OF ASSESSABLE PENALTIES.

(a) *Penalty Assessed as Tax.*—The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.

(b) *Person Defined.*—The term "person", as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

SEC. 6672. FAILURE TO COLLECT AND PAY
OVER TAX, OR ATTEMPT TO
EVADE OR DEFEAT TAX.

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

26 U.S.C. §7501.

**SEC. 7501. LIABILITY FOR TAXES WITHHELD
OR COLLECTED.**

(a) *General Rule*—Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose.